In the Matter of:

SYED M.A. HASAN, **ARB CASE NO. 01-006**

COMPLAINANT, **ALJ CASE NO. 2000-ERA-14**

v. **DATE: May 31, 2001**

WOLFE CREEK NUCLEAR OPERATING CORP.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD[1/]

Appearances:

For the Complainant:
Syed M.A. Hasan, *pro se, Madison, Alabama*

For the Respondent:
J. Patrick Hickey, *Shaw Pittman, Washington, D.C.*

FINAL DECISION AND ORDER

BACKGROUND

This case arises under the employee protection provisions of the Energy Reorganization Act ("ERA"), which prohibit an employer from discriminating against or otherwise taking unfavorable personnel action against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee engaged in protected whistleblowing activity. 42 U.S.C.A. §5851 (West 1995). This case is one of many that

[1/] This appeal has been assigned to a panel of two Board members, as authorized by Secretary's Order 2-96. 61 Fed. Reg. 19,978 §5 (May 3, 1996).

Complainant Syed Hasan has filed against various companies for failing to hire, retain, or rehire him.[2/]

According to Hasan, he applied for a job with Respondent as a "civil/structural/pipe support engineer" in December 1994, on June 11, 1999, and on November 6, 1999. As part of his November 6, 1999 application, Hasan informed Respondent that he has a history of whistleblowing activity. When he did not receive a favorable reply to his application by November 18, 1999, Hasan filed a complaint with the Occupational Safety and Health Administration ("OSHA")[3/] alleging that Respondent refused to hire him because he was a whistleblower. OSHA found no merit to Hasan's complaint. Hasan objected to that determination, and the case was referred to an Administrative Law Judge ("ALJ") for disposition.

After participating in discovery, Respondent advised the ALJ that Hasan's complaint was time-barred with regard to the 1994 application because it was not filed within 180 days of the alleged violation as required by the ERA. Respondent also asserted, among other things, that:

> In order to survive a pre-hearing Motion to Dismiss for failure to state a claim, it is not enough for the Complainant to simply state that he remained unemployed after submitting a resume to the employer. Rather the Complaint must allege with sufficient specificity that the Complainant applied for a particular opening for which he was qualified and that after such rejection, the position remained open and the employer continued to seek applicants from among those persons with his qualifications.

[2/] *Hasan v. Florida Power & Light Co.,* ARB No. 01-004, ALJ No. 2000-ERA-12 (ARB May 17, 2001); *Hasan v. Sargent & Lundy,* ARB No. 01-001, ALJ No. 2000-ERA-7 (ARB Apr. 30, 2001); *Hasan v. Commonwealth Edison Co.,* ARB Nos. 01-002, 01-003; ALJ Nos. 2000-ERA-8, 2000-ERA-11 (ARB Apr. 23, 2001); *Hasan v. Commonwealth Edison Co.*, ARB No. 01-005, ALJ No. 2000-ERA-13 (ARB Apr. 23, 2001); *Hasan v. Burns & Roe Enterprises, Inc.*, ARB No. 00-080, ALJ No. 2000-ERA-6 (ARB Jan. 30, 2001); *Hasan v. Commonwealth Edison Co.*, ARB No. 00-028, ALJ No. 2000-ERA-1, (ARB Dec. 29, 2000); *Hasan v. Intergraph Corp*., ARB No. 97-016, ALJ No. 96-ERA-17, (ARB Aug. 6, 1997); *Hasan v. Bechtel Power Corp.*, No. 94-ERA-21 (Sec'y Mar. 16, 1995); *Hasan v. Bechtel Power Corp.*, No. 93-ERA-40 (Sec'y Feb. 13, 1995); *Hasan v. System Energy Resources, Inc.*, No. 89-ERA-36 (Sec'y Sept. 23, 1992); *Hasan v. Nuclear Power Services, Inc*., No. 86-ERA-24 (Sec'y June 26, 1991); *Hasan v. Stone & Webster Engineers and Constructors, Inc.*, ARB No. 01-007, ALJ No. 2000-ERA-10 (ALJ Oct. 5, 2000); *Hasan v. Sargent & Lundy*, No. 96-ERA-27 (ALJ Nov. 4, 1996); *Hasan v. Bechtel Power Corp.*, No. 93-ERA-22 (ALJ Dec. 8, 1994); *Hasan v. Nuclear Power Services Inc.*, No. 86-ERA-36 (ALJ July 27, 1989).

[3/] OSHA is the agency within the Department of Labor ("DOL") charged with investigating ERA whistleblower complaints. See 29 C.F.R. §§24.4, 24.5 (2000).

Respondent's Memorandum of Law in Support of Its Motion to Dismiss at 6-7. Therefore, Respondent moved to dismiss the complaint because it was untimely filed with regard to the 1994 application and because it failed to allege essential elements of a *prima facie* case concerning the 1999 applications. *Id.*

Hasan opposed the motion to dismiss asserting that he submitted his application in response to an advertisement on the internet. However, Hasan did not allege that his complaint with regard to the 1994 application was timely. He also did not allege that the position for which he applied in 1999 remained open and that Respondent continued to seek applicants from among those persons with his qualifications.

By Order dated April 20, 2000, the ALJ directed Hasan to show cause why his complaint should not be dismissed for failure to state a claim upon which relief could be granted. In his response, Hasan did not address the timeliness issue nor did he assert that the position remained open and that Respondent continued to seek other applicants. Instead, he asserted, among other things, that Respondent was aware of his protected activities either through its counsel or through an employee that he identified only as "engineer H."

The ALJ concluded that the complaint regarding the 1994 application was time-barred because it was filed beyond the 180-day time limit under the ERA. As to the 1999 applications, the ALJ found that Hasan had not asserted that the position in question remained open and that Respondent continued to seek applicants with his qualifications. In the absence of such allegation, the ALJ found that Hasan had failed to allege an essential element of a *prima facie* case. Additionally, the ALJ found that Hasan's case was further defective in that he had not alleged facts sufficient to establish that Respondent was aware of his protected activity. Specifically, the ALJ stated:

> Complainant's statements, taken as true, do not amount to a prima facie case that Respondent had knowledge of Complainant's protected activity. Complainant does not allege that any employee responsible for, or having input in, the hiring practices of Respondent had any knowledge of his protected activity. The only people Complainant alleges to have knowledge of his protected activity is counsel for Respondent and "H", but he does not allege that either of these persons had any input in the hiring decisions of Respondent.

Consequently, by Order issued October 11, 2000 ("RD&O"), the ALJ recommended that the complaint be dismissed. This appeal followed.

JURISDICTION

We have jurisdiction pursuant to 42 U.S.C.A. §5851 and 29 C.F.R. §24.8.

STANDARD OF REVIEW

Under the Administrative Procedure Act, we have plenary power to review an ALJ's factual and legal conclusions *de novo*. See 5 U.S.C.A. §557(b) (West 1996); *Masek v. Cadle Co.*, ARB No. 97-069, ALJ No. 95-WPC-1, slip op. at 7 (ARB Apr. 28, 2000).

DISCUSSION

To state a claim under the ERA, the complainant must allege that: (1) the complainant engaged in protected conduct; (2) the employer was aware of that conduct; (3) the employer took some adverse action against him; and (4) there is evidence sufficient to raise an inference that the protected activity was the likely reason for the adverse action. *Carroll v. Bechtel Power Corp.*, No. 91-ERA-46, slip op. at 9 (Sec'y Feb. 15, 1995) (citing *Dartey v. Zack Co. of Chicago*, No. 82-ERA-2, slip op. at 7-8 (Sec'y Nov. 13, 1991), *aff'd sub nom, Carroll v. Dep't of Labor*, 78 F.3d 352 (8th Cir. 1996). *See also McCuistion v. TVA*, No. 89-ERA-6, slip op. at 6 (Sec'y Nov. 13, 1991); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1162 (6th Cir. 1983).

In this case, Hasan alleged that, while working for another employer, he reported safety concerns to the Nuclear Regulatory Commission. That allegation is sufficient to establish the first element of a *prima facie* case. However, he has not pled facts sufficient to establish the remaining elements.

To satisfy the second element, Hasan must allege that at least one of the employees responsible for, or having input in, the hiring practices of Respondent knew about his protected activity. *See Floyd v. Arizona Public Service Co.*, No. 90-ERA-39 (Sec'y Sept. 23, 1994). Rather than allege facts, Hasan merely speculated that either Respondent's counsel or "engineer H" informed the hiring officials of his protected activity.[4/] According to Hasan, if the ALJ had granted him discovery and held a hearing, he would have been able to establish the facts in support of his claim.

[4/] Hasan asserts on appeal that Respondent had to be aware of his protected activity because he disclosed it in his November 6, 1999 letter. However, Hasan did not raise this argument in response to the ALJ's show cause order. We decline to consider this argument for the first time on appeal and, instead, limit our review to the record established before the ALJ. Moreover, even accepting Hasan's statement, Hasan nevertheless failed to satisfy the second element of his *prima facie* case. An allegation that the Respondent must have known of his protected activity is insufficient, standing alone, to establish that one of the employees responsible for or having input in the decision to reject Hasan's application for employment knew about his protected activity. *Accord Hasan v. Burns & Roe Enterprises, Inc.*, ARB No. 00-080, ALJ No. 2000-ERA-6, slip op. at 5-7 & n.8 (ARB Jan. 30, 2001) (The complainant failed to establish a *prima facie* case where the hiring official averred that he did not see the letter in which the complainant revealed his whistleblowing activities prior to making the decision not to hire the complainant.).

Hasan must support his claim with more than mere speculation. As we have held before, a complainant cannot simply "file a conclusory complaint not well-grounded in fact, conduct a fishing expedition for discovery, and only then amend his complaint in order to finally set forth well-pleaded allegations." *Hasan v. Commonwealth Edison Co. and the Estes Group, Inc*., ARB No. 00-028, ALJ No. 00-ERA-01, slip op. at 5 (ARB Dec. 29, 2000). Inasmuch as Hasan has not alleged that at least one of the employees responsible for making hiring decisions knew about his protected activity, he has not satisfied the second element of a *prima facie* case.

With regard to the third element, the Secretary has previously recognized that there are three factors that must be considered in determining whether a refusal to hire constitutes an adverse action. *Samodurov v. General Physics Corp.*, No. 89-ERA-20 (Sec'y Nov. 16, 1993). Under *Samodurov*, the complainant must allege: 1) that he applied and qualified for a job for which the employer was seeking applicants; 2) that, despite his qualifications, he was rejected; and 3) that after his rejection, the position remained open and the employer continued to seek applicants with his qualifications. Although Hasan has alleged facts sufficient to satisfy the first two prongs of the *Samodurov* test, he has not alleged that, following his rejection, the position remained open and the employer continued to seek applicants with his qualifications. Thus, Hasan has failed to establish the third element of a *prima facie* case. In light of Hasan's failure to allege two essential elements of a *prima facie* case, we concur with the ALJ that this complaint should be dismissed.[5/]

SO ORDERED.

CYNTHIA L. ATTWOOD
Member

RICHARD A. BEVERLY
Alternate Member

[5/] Hasan has raised a number of other arguments in this case. The Board finds those arguments without merit and they do not warrant a separate discussion in this Order.